Newsletter of the Utah Prosecution Council

The Utah PROSECUTOR

LEGAL BRIEFS

United States Supreme Court

State petitions for post-conviction relief are not "properly filed" under the AEDPA if they are not filed within the state's statute of limitations.

Siebert was convicted of murder and sentenced to death in Alabama. He filed a petition for post-conviction relief, but the court denied his petition because it was filed three months after the expiration of the state's 2-year statute of limitations. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a 1-year statute of limitations for federal habeas

petitions and this period is tolled while "a properly filed application for State post-conviction relief" is being considered §2244(d)(2). Siebert filed a federal habeas petition. The district court rejected Siebert's habeas petition as untimely because it was not tolled since the state petition for post-conviction relief was not "properly filed" under the AEPA, having been rejected under the State's statute of limitations. The court of appeals reversed on the ground that the post-conviction petition was "properly filed" since the state's statute of limitations was not jurisdictional and the Alabama state court had discretion in enforcing it. The case was remanded to the District Court. In the meantime, the United States Supreme Court decided *Pace v. DiGuglielmo*, 544 U.S. 408 (2005) where it held that a state post-conviction petition rejected by the state court under a statute of limitations is not "properly filed" under the AEDPA. The district court, accordingly, denied Siebert's habeas corpus petition once again. But the court of appeals again reversed saying that *Pace* is distinguishable because the statute of limitations in Alabama operates as an affirmative defense while the limitations period in *Pace* did not. The Supreme Court reversed on cert. The Court said that the jurisdictional nature of the statute of limitations was not their basis for deciding *Pace*. It was more concerned with the difference between post-conviction petitions rejected on the basis of "filing conditions," such as

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statutes of limitation, and "procedural bars that go to the ability to obtain relief," *Id.* at 417. It found that a statute of limitation is a "filing condition" that can limit habeas petitions because such a limitation goes, not to the form of the petition with its potential for minor procedural flaws, but to the court's very ability to consider the petition. Because Siebert's failure to file his petition within the statute of limitations is a "filing condition," his habeas petition is not "properly filed" under the AEDPA. *Alabama Dep't of Corr. v. Siebert*, 552 U.S. 1 (2007)(*cert. granted).*

Utah Supreme Court

In order to prove tax evasion, the State must first prove that there was a tax deficiency.

Eyre was charged with tax evasion and failure to file a tax return for the years of 1997-2002. At trial, the State admitted evidence showing that Eyre's income exceeded the minimum amount requiring a taxpayer to file a state income tax return. Eyre asserted that he believed that his deductions outweighed his income for those years, and attempted to admit a document that he had prepared which summarized his finances for the years in question. The court refused to admit the evidence on the ground that it was unreliable. Eyre was convicted and at sentencing prepared tax returns where an expert showed that there was little to no deficiency in his income tax. Eyre appealed his conviction on the ground that the State failed to present sufficient evidence to prove that he had a tax deficiency and that his counsel was ineffective in failing to object to the jury instructions because they did not include a statement that a tax deficiency, or more tax due than there are deductions to cover it, is an element of tax evasion. The Utah Supreme Court agreed with Eyre. It found that "tax deficiency" is a necessary element in the crime of tax evasion and that the jury instructions were lacking. The court reasoned that if there is no tax owing, there is no tax to evade. Therefore, the State has to prove, not only income beyond the minimum to require one to file a tax return but that a defendant's income exceeds their usable tax deductions. The court also held that Eyre's trial counsel rendered ineffective assistance since he failed to object to the jury instructions. It found that such a failure is an objectively deficient performance and did cause Eyre prejudice. *State v. Eyre*, No. 20050664 (Utah Dec. 4, 2007).

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Case Summaries

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A violation of Rule 11 does not, by itself, render a petition for post-conviction relief meritorious. Courts considering whether an untimely appeal under the PCRA's statute of limitations can be exempted must weigh the reasons for the untimely submission and the merits of the claim.

Bluemel plead guilty to three counts of rape for having intercourse with her fourteen-year-old foster child. The plea agreement notified Bluemel that in pleading guilty she would be waving certain constitutional rights such as right to a jury trial, right to compel witnesses, right to the presumption of innocence, right to appeal, etc. Before signing the agreement, the trial court asked her if she understood her rights and if she freely and voluntarily waived them. She said that she did. However, Bluemel claimed that after sentencing, she told her attorney that she wanted to appeal, but that he never made arrangements. She secured new counsel and appealed on the ground that at the time she signed the plea agreement she was taking a number of medications that prevented her from entering into the plea knowingly and voluntarily. The postconviction court granted the State's motion to dismiss on the ground that the appeal was untimely. However, the court of appeals reversed on the ground that the trial court violated Rule 11 which requires the court to actually ask the defendant if she fully read, understood, and acknowledged her plea" and requires that the court inform the Defendant about her presumption of innocence, both of which the court failed to do in this case. The court of appeals found that this failure fell under the PCRA's exception to the statute of limitations and, therefore, the Defendant's appeal was not barred from consideration. The State appealed and the Utah Supreme Court reversed, finding that the violation of Rule 11, by itself, does not render a petition for post-conviction relief meritorious and that the court of appeals failed to weigh the merit of a claim for postconviction relief and the purpose for the late appeal. The court remanded with instructions to weigh these two considerations before granting the appeal. *State v. Bluemel*, No. 20060586 (Utah Nov. 6, 2007).

Organizations are protected from liability under the Governmental Immunity Act if they are a government entity performing a government function and have not waived their immunity or fall under an exception to waiver. Issuing licenses is one such exception.

Moss brought a claim against the Pete Suazo Utah Athletic Commission ("the Commission") to recover damages for the death of her brother. Moss' brother, Rone, was a professional boxer and accepted a fight in Cedar City in order to raise money to buy a plane ticket so that he could attend his mother's funeral. During the fight, Rone experienced heart failure and died in the ring. Moss alleges that the Commission was negligent in failing require Rone to have a medical examination before the fight. Under the Comission's rules, a fighter must receive a medical examination if he has lost more than six fights consecutively previous to the appointed fight, has recently lost by a technical knockout, or has been prohibited from fighting in other states for medical reasons. All of these provisions applied to Rone. The Comission filed a motion to dismiss Moss' claims that was granted under the Governmental Immunity Act. Moss appealed. The Utah Supreme Court found that the Commission did fall under the Governmental Immunity Act. The court held that by issuing licenses for boxing, the Commission was a governmental entity and it performed a governmental function as is required by the act. The court also found that although negligent conduct is generally considered a waiver of governmental immunity, the Commission's activities fell under an exception because they issue licenses and permits. Moss argued that the exception should not apply to licenses granted for activities that are inherently dangerous. However, this argument is not supported by case law and contravenes the statute. Moss also claimed that the Commission's duty to prevent Rone from fighting is separate from issuing licenses. However, the court found that the extremely broad language of the statute indicates the Legislature's intention of including ANY activities that are connected to licensing, including the activities for which the licenses are being issued. Moss also argued that the Governmental Immunity Act as applied violates the constitution. The court said in order to overcome such a claim the Commission only has to prove that the activity is of such a nature that it can only be performed by a government agency. The court found that the Commission successfully made this showing because this type of regulation is qualitatively different than if it had been provided by a private organization. *Moss v. Pete Suazo Utah Athletic Comm'n*, No. 20060438 (Utah Dec. 21,

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PROSECUTOR PROFILE:

Stan Tanner,
Technical Support Specialist

Stan Tanner was hired in October to be a Technical Support Specialist for the UPC. He is currently working on the UPC's new PIMS project-a website to connect law enforcement, courts, and prosecutors.

"The underlying idea for PIMS is to have the law enforcement community throughout the state of Utah talking to each other. This includes the prosecutors, the courts, and the various police agencies," says Stan. "The UPC has been actively involved in this project for some time. PIMS was designed and created to fill a role in allowing the prosecutor offices and the courts to become a paperless entity. A major addition to this would be the inclusion of the police agencies."

Stan had a successful career as a police officer for the city of Saskatoon, Saskatchewan, Canada. Because of his background, he understands the importance of efficient communication between officers, courts, and lawyers. He is using his two areas of expertise—technology and law enforcement—to create a system that is both user friendly and effective.

"Currently, most of the counties and several cities have been put on the PIMS system. By mid-summer or early fall, we hope to have most, if not all of those that opt for the system, up and operating," says Stan. "Our next step which is now in development, will be to tie the courts into the PIMS system. This will be accomplished with the Court system (Covis) and PIMS communicating with each other."

Stan grew up in Cranbrook, British Columbia, Canada and always wanted to be either a cop or a teacher. He received an Associates in Arts & Sciences from Rick's College and then attended Saskatchewan Police College and Canadian Police College to prepare for his career in law enforcement.

Stan's greatest inspiration is his parents. "My father was always fair, never talked bad to us or about us, stood by us, even when he had to 'whup us good fer what we done'," says Stan lightheartedly. "My mother, on the other hand, was the most contrary person I have ever met But when I was on my own, I would always kneel and thank God that I had a mother who would teach me all the survival skills I needed to survive until I could find someone unsuspecting enough to marry me."

Stan has traveled all over Canada, most of the US, the Bahamas, Mexico, and Hawaii. He knows ASL and can speak a some French and Russian. He hopes to be able to visit Russia someday.

Stan met his wife at a Halloween party 40 years ago when she was 15 and Stan was 18. They have two sons and four daughters between the ages of 35 and 28. As for pets, Stan says that his 2 computers, ipod, and various other electronic gadgets qualify.

QUICK FACTS:

>College:
"Rick's College" (Now BYU Idaho)

>First Job:
Babysitting (He was the 2nd of 8 kids) and Mailman

>Hobbies:
Carpentry & Restoring Old Vehicles

>Favorite Music:
All music from late 50's to early 70's

>Favorite Movie:
"Better off Dead"

>Favorite Book
"The Chrysalids" by Johnathan Wyndham

>Favorite Quote:
From Charlie Brown, "There's no problem big enough that it can't be run away from."

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2007).

Under *Shondel* if there are statutes with identical elements for two separate crimes that have dissimilar penalties, the court must use the more lenient penalty. However, if there is any discernable difference between the statutes, *Shondel* does not apply.

Williams was arrested when he failed to return to jail. His person was searched, and officers found a plastic bag containing residue of methamphetamine in his pocket. He was charged with one count of possession of a controlled substance in a drug-free zone with prior convictions, a first degree felony. Williams moved to have this charge dismissed in favor of the lesser charge of possession of drug paraphernalia, a misdemeanor. In order to prove the felony, the State would have to prove that Williams knowingly possessed the residue. To prove the misdemeanor, the State would have to show possession of an illegal container and the residue could be one of the facts to prove that the plastic bag was an illegal container under the statute. Williams argued that since the evidence to sustain one charge would sustain the other, he should be given the lesser charge under *State v. Shondel*, 453 P.2d 146. In *Shondel* the Utah Supreme Court found that where statutes for two separate crimes possess the same elements but have dissimilar penalties, the statutory crime with the lesser penalty should apply. The court reasoned that the Legislature is not justified in enacting two identical criminal penalties that carry punishment with different degrees of severity. This would create a trend of treating defendants disproportionately and cause prosecutors to pursue harsher or a more lenient punishments depending upon their personal biases. The appellate court affirmed the finding of the trial court, but the Utah Supreme Court reversed. The court said that the two statutes were distinguishable. The Legislature intended to punish those with drug paraphernalia as a misdemeanor and those with actual possession of the drug as a felony. In this case, though Williams only possessed a residue of methamphetamine, he did possess the drug and should be punished under the more severe statute. *State v. Williams*, No. 20060517 (Utah Dec. 21, 2007).

Whether a court may grant a motion for an award of attorney's fees under the private attorney general doctrine depends upon whether an important public right has been vindicated. Whether a monetary benefit has been gained or whether the party can pay its own fees are irrelevant.

During the November 2000 general election, a majority of the voters in Davis County voted to have fluoride added to the county's water supply in order to better the public's dental health. Shortly after the referendum was passed, the minority circulated a petition in order to get the issue back on the ballot for the 2002 election. The petition was submitted to the County Clerk and he agreed to include the issue on the 2002 ballot. Utahns For Better Dental Health-Davis, Inc. (UFBDH) challenged the constitutionality of the revote question on the 2002 ballot. UFBDH claimed that the revote violated statutory and constitutional law regarding referenda. The court agreed and found that the revote would be an abuse of the people's direct legislative power granted by the Utah Constitution. UFBDH made a motion for an award of attorney's fees under the private attorney general doctrine. Its motion was denied by the district court because there was no substantial monetary benefit created by UFBDH's actions, there was no windfall for the County Clerk, and UFBDH had the ability to pay their own attorneys fees. UFBDH appealed. The Utah Supreme Court reversed. Attorney's fees are granted in rare circumstances where the court believes that the grant or denial is required for an equitable result. In private attorney general cases, the court evaluates "whether an important right affecting the public has been vindicated." In this case the court found that this case involved such a right. This case regarded the fundamental right of the public to contribute directly to the legislative process. The court said that the trial court erred in requiring the plaintiff to show an inability to pay its own attorney's fees or monetary benefit gained. *Utahns for Better Dental Health-Davis v. Rawlings*, No. 20060321 (Utah Dec. 21, 2007).

Utah Court of Appeals

A plaintiff does not have standing to gain injunctive or declaratory relief because of a municipal zoning ordinance unless the plaintiff proves special damages. An established

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line of precedent is not overruled by an inconsistent decision unless the court explicitly overrules it.

The Pyles built a large garage on their property in Big Water Town, UT. A building inspector tagged the building for violating the City's setback ordinance. The Big Water Board of Adjustment reversed the building inspector's decision because the setback ordinance was overly vague. The Big Water Town Council subsequently amended the ordinance. The Pyles garage complied with the amended ordinance. Specht, a resident of Big Water, challenged the decision of the Board of Adjustment regarding the Pyles garage. He also sought a declaration that the amended ordinance be invalidated because the town council failed to publish notice of its meeting in a newspaper. Summary judgment was granted to the City. On appeal, the City argued that Specht lacked standing to challenge the land use decisions or request declaratory relief because he had not proven special damages personally incurred. Specht argued that under Utah Supreme Court case *Culbertson v. Board of County Commissioners*, 44 P.3d 642 (Utah 2002) a resident has standing to request declaratory and injunctive relief for zoning violations within his city. The court disagreed. It held that an individual does not have standing unless he has suffered personal injury as a result of the zoning decision or violation. The Utah Supreme Court has iterated this principal in several cases by finding that a plaintiff does not have standing for violation of zoning ordinances unless the injury to him is greater than that of the injury to the public in general. The court also found Specht's use of *Culbertson* unconvincing. Although the plaintiff in that case was in a similar situation to Specht, the court never formally overruled its stance on standing. If a court deviates from established precedent, but fails to explain its deviation or explicitly overrule its former decisions, the rule of law under those decisions remains unchanged. *Specht v. Big Water Town*, No. 20060695 (Utah Ct. App. Oct. 18, 2007).

Criminal negligence is a gross deviation from the standard of care. Reference to a defendant's request for counsel does not require pronouncing a mistrial if the reference is not being used to impeach or as evidence of substantive guilt. Alternative viewpoints of existing evidence are appropriate.

Deputy Redding was assisting with a domestic violence arrest when she received a dispatch from another officer asking for

help at a traffic stop near Coconut Point, a notoriously dangerous location. Redding left the scene and received a second dispatch from the officer asking backup officers to "step it up a little." Officer Redding accelerated her speed to 70 miles per hour in a 40 mile per hour residential area. She failed to put on her lights or siren. Meanwhile, Hillam was in her car on the same street attempting to make a left hand turn into her driveway. She noticed Redding's car in the distance but didn't notice Redding's high speed. Redding hit the side of Hillam's car. The two girls in the back of Hillam's car were ejected from the vehicle and one of them was killed. Redding was convicted of negligent homicide and negligent collision. She appealed on several grounds including insufficient evidence to show criminal negligence and prosecutorial misconduct because the prosecution elicited testimony that Redding had requested counsel before answering questions and for making the inference during closing arguments that Redding should have known that the disturbance at Coconut Point was resolved before the collision. The Utah Court of Appeals affirmed. It found that evidence of criminal negligence was not insufficient because driving thirty miles over the speed limit without police lights or sirens was an unjustifiable risk that showed a gross deviation from the standard of care required of a police officer, notwithstanding the requests of the officer over dispatch. The court also found that the witness testimony regarding Redding's request for counsel before answering questions was not inappropriate because it was not used to impeach Redding or infer Redding's guilt. Finally, the court held that the prosecution's remarks that Redding should have been aware that the Coconut Point disturbance was over was not unsupported in evidence. It was an alternative viewpoint of the evidence before the court. *State v. Redding*, No. 20051078 (Utah Ct. App. Oct. 25, 2007).

Under Utah Code Ann. § 76-5-406.5(1), a Defendant convicted of aggravated sexual abuse may qualify for probation if he proves, among other requirements, by clear and convincing evidence, that he did not cause physical or psychological harm to the child, his rehabilitation is probable, and probation is in the best interest of the child.

Offerman was convicted of two counts of aggravated sexual abuse of child M.O. After conviction, Offerman attended a sentencing hearing where the court determined that Offerman was not eligible for probation under Utah Code Ann. § 76-5-406.5 (2003) which

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allows sexual offenders to be eligible for probation if they meet twelve requirements. The court found that Offerman failed to meet subsection (b), providing that the defendant must not have caused physical harm or severe psychological harm to the child; subsection (i), requiring a showing that rehabilitation of the defendant is probable; and subsection (k), requiring a showing that it is in the best interests of the child for the offender be put on probation rather than in prison. Offerman appealed, arguing that he did meet these three requirements by a preponderance of the evidence. The Utah Court of Appeals disagreed. Offerman had called a psychologist and two probation officers. They failed to prove his eligibility for probation. The witnesses who addressed rehabilitation declined to say whether rehabilitation was probable and, instead, testified that it was possible. When asked whether M.O. had received psychological harm, the psychologist testified that he had not yet determined the full impact of the incident on M.O. The psychologist also testified that he had not yet been able to determine whether it would be in the best interests of M.O. for Offerman to be on probation. Because of the lack of substantive testimony, the court found that Offerman failed to prove the remaining three requirements by a preponderance of evidence. *Utah v. Offerman*, No. 20060108 (Utah Ct. App. Oct. 18, 2007).

Under the Utah No-Fault Insurance Act, those who have no-fault automobile insurance may not be liable for PIP benefits.

Miller broadsided Ms. Haymond's vehicle while intoxicated with Oxycontin, seriously injuring Ms. Haymond and killing her seven-year-old daughter, Karlee. After settlement between the insurance companies of both parties, Miller's insurance, Unigard, paid Miller's civil liability, covering wrongful death claims, vehicle damages, and other claims. Haymond's insurer, Safeco, paid Ms. Haymond $10,000 in Personal Injury Protection (PIP) for medical expenses. Safeco sent a letter to Unigard, waiving its PIP subrogation as a result of the settlement. Miller was convicted of automobile homicide. The State moved for a restitution hearing in which the court ruled that Safeco was entitled to collect the $10,000 in PIP expenses from Miller. Miller appealed, arguing that the court's

restitution order violated Utah's no-fault automobile insurance statutes. Utah's restitution statute requires pecuniary damages, which are "all special damages… which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities." Utah Code Ann. § 77-38a-102(6). The court quoted Utah's No-Fault Insurance Act under Utah Code Ann. § 31A-22-309(1)(a)(2005) providing that when a person has direct benefit coverage which includes personal injury protection, another party may not maintain a cause of action against them requiring general damages arising out of injuries sustained in an auto accident. Therefore, under the No-Fault Insurance Act, a tort-feasor who has no-fault insurance is not personally liable for PIP benefits in civil suits. Since Safeco could not prevail in a civil action, these types of damages do not qualify as "pecuniary damages" under § 77-38-102 (6). The no-fault insurance statutes do say that the victim's insurer has a right to recover PIP payments from the wrongdoer's insurance company. However, the only proceeding available for reimbursement of PIP payments is an arbitration proceeding. Arbitration proceedings are not civil actions under the Utah Rules of Civil Procedure. Therefore, arbitration does not fall under the § 77-38a-102(6) definition of pecuniary damages. Thus, Safeco's claim fails. *State v. Miller*, No. 20060646 (Utah Ct. App. Oct. 12, 2007).

Courts look at the totality of the circumstances to determine probable cause. The Fourth Amendment's "automobile exception" does not have a separate exigency requirement.

Witnesses noticed Despain swerve in and out of his lane and finally crash into a trailer parked on the side of the road. Officer Spotten arrived at the scene and found Despain leaning against the trailer. Despain denied that he had consumed alcohol or drugs when questioned but his speech was slurred. Witnesses told Spotten that Despain had been driving erratically just prior to the accident and had ran another car of the road and swerved in front of a semi truck. Based on this evidence, Spotten arrested Defendant for driving under the influence after he was transported to the hospital. Medical personnel reported that before arrest, Despain was strangely paranoid about retrieving something from his car. Spotten searched the car and found methamphetamine and marijuana. At trial, the court denied Despain's motion to suppress the evidence and Despain plead guilty to DUI and possession of a controlled substance. He appealed on the ground that the trial court erred in finding that Spotten had probable cause to arrest him since Spotten relied only on reports of witnesses and he did

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On The Lighter Side!!

(From http://www.crazy-jokes.com/Christmas-Cartoons/xmas_11.shtml)

Reckless Driver Gets a Beating from Four Little Old Ladies

Turn up your sound and click on the website below. This accident happened in the Dallas-Ft. Worth area and you must listen to it. It is a phone call from a man who witnesses a car accident involving four elderly women. It was so popular when they played it on CHUM FM that they had to put it on their website. The guy's laugh is contagious. If you close your eyes and picture what he is watching, it is even better than a video clip!
http://www.chumfm.com/MorningShow/bits/march24.swf

Battery By Deposition

(From http://www.re-quest.net/g2g/humor/courtroom/index.htm)

By the Court: You may call your next witness.

By Defendant's Attorney: Your Honor, at this time I would like to swat [opposing counsel] on the head with his client's deposition.

The Court: You mean read it?

Defendant's Attorney: No, Sir. I mean to swat him on the head with it. Pursuant to Rule 32, I may use the deposition "for any purpose" and that's the purpose I want to use it for.

The Court: Well, it does say that.

Quiet pause.

The Court: There being no objection, you may proceed.

Defendant's Attorney: Thank you, Judge.

Thereafter, Defendant's attorney swatted plaintiff's attorney on the head with the deposition.

By Plaintiff's Attorney (the victim): But Judge ...

The Court: Next witness.

Plaintiff's Attorney: ... We object

The Court: Sustained. Next witness.

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not conduct field sobriety tests. He also argued that the court erred in allowing evidence produced by the warrantless search of Despain's car, since Utah courts tend to require both a showing of probable cause and a showing of likelihood that the evidence may be destroyed or lost if not immediately seized. The Utah Court of Appeals affirmed. It found that Spotten did have probable cause under the totality of the circumstances—the slurred speech, the erratic driving, and the car accident. The court also found that, though the state did not show that the material needed to be immediately seized, the United States Supreme Court has found that the "automobile exception" to the Fourth Amendment doesn't require a this showing of separate exigency. The Officer's search of the vehicle was, therefore, justified under the automobile exception because there was probable cause to believe that the Defendant's vehicle contained drugs. *State v. Despain*, No. 20060769 (Utah Ct. App. Nov. 16, 2007).

Public employees' rights are statutory and not contractual and are, therefore, subject to the statute of limitations under the Personnel Management Act. Probationary employees do not have rights to appeal termination and notice of termination available to permanent employees.

Code was a public employee who transferred from the Department of Health (DOH) to the Utah School for the Deaf and Blind (USDB) to do secretarial work. She has cerebral palsy and was designated a probationary employee. She was fired after two months for failing in her work. Code filed for wrongful termination and breach of contract. The Defendants filed for a motion to dismiss on the ground that Code brought her claims after the statutory three-year statute of limitations period under the Personnel Management Act (PMA) and that she failed to file a notice of a claim as required by the Governmental Immunity Act (GIA). She contended that her claims are under contract and not under statute and, therefore, a four-year statute of limitations applies. She argued that she had an implied employment contract arising out of the provisions of the State Human Resources Employment Handbook ('the Handbook"). She also claimed that her disability was the cause for her firing. The Utah Court of Appeals disagreed. It held that public employee's rights are not contractual but statutory unless the government has undertaken additional employment obligations. Public employees are, therefore, governed by the PMA and subject to the three-year statute of limitations period. Code also claimed that under the Handbook she had a right of notice before termination and a right to appeal the dismissal, neither of which she received. The court said that even if the Handbook has such provisions they are of no effect because they contradict the PMA. The PMA says that a probationary employee may not use the appeals system reserved for permanent employees and that probationary employees may be terminated at any time without notice. The court also found that the legislative intent behind the PMA was to have the statute preempt any common law remedies for employment discrimination, even against those with disabilities. *Code v. Utah Dep't of Health*, No. 20050255 (Utah Ct. App. Dec. 13, 2007).

The felony of False Evidence of Title and Registration under 41-1a-1315(2) requires a showing that there is a reasonable belief that the defendant knowingly made a false statement on a registration application. A showing of fraudulent intent is not required.

Johnson was charged with eight counts of False Evidence of Title and Registration under Utah Code section 41-1a-1315(2), a second degree felony, for putting a false address on his car registration applications. He listed his address as Hildale, Utah when he actually lived two blocks south of Hildale and the Utah boarder in Colorado City, Arizona. By listing his address in Utah instead of Arizona, Johnson was able to avoid paying a significant amount in taxes and registration fees. Utah Code section 41-1a-1315(2) says that the State must prove that the defendant "knowingly ma[de] a false statement or knowingly conceal[ed] a material fact in [a] [registration] application…." The trial court dismissed all charges, finding that the State failed to prove that the there was fraudulent intent and failed to prove that the address was actually false since the post office could easily identify the address. The State appealed, claiming that the trial court improperly required them to find fraudulent intent. The Utah Court of Appeals agreed, holding that the statute only requires that the false statement be made "knowingly." Under this standard, the State only has to provide evidence showing a reasonable belief that he knowingly made a false statement or was "aware of the nature of his conduct." Utah Code Ann. § 76-2-103 (Supp. 2007). The State also argued on appeal that Johnson did knowingly make a false statement when he listed his address as being in Hildale, Utah. The State submitted evidence

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that inferred Johnson's knowledge including the fact that he has an Arizona driver's license, he was the Mayor Pro tem of Colorado City, Arizona, and he is associated with a dairy in the boarders of Arizona. The court found that this evidence reasonably supports the claim that Johnson was aware that the information on his car registration was not correct. Therefore, the ruling was reversed. *State v. Johnson*, No. 20060970 (Utah Ct. App. Dec. 13, 2007).

The thirty-day limitations period for appeal commences on the date of a final judgment. A judgment is not final if some counts charged against the defendant are still pending.

The State filed a motion for summary dismissal on a notice of appeal by Millet on the ground that it was untimely. Millet was appealing a conviction with one count of Sodomy on a Child and one count of Aggravated Sexual Abuse of a Child. The trial court filed the judgments on these counts on July 30, 2007 but set another charge of one count of Failure to Register as a Sex Offender aside for further jury trial. The caption of the judgment said July 31, despite the fact that the judgment was signed on July 30. Millet filed his notice of appeal on August 30, 2007, thirty-one days after the entry of judgment on July 30, exceeding the thirty day time limit for appeal under Utah R. App. P.4(a). The Utah Court of Appeals denied the motion for summary dismissal on the ground that it lacked jurisdiction. The court held that the July 30, 2007 judgment was not a final judgment because the count of Failure to Register as a Sex offender was still pending until he was sentenced on all three counts on October 17, 2007. Therefore, the court does not have jurisdiction to hear it. The court found that the time for appeal commenced on October 17, 2007 or upon the day when a signed judgment is entered after that date. *State v. Millet*, No. 20070725 (Utah Ct. App. Dec. 20, 2007).

An initial stop is proper if an officer possesses reasonable suspicion that there is illegal activity afoot. The accuracy of the information that causes the suspicion is irrelevant as long as the belief is reasonable.

Highway Patrolman Gurney pulled over Snedeker after he discovered on his computer that the vehicle was owned by a business and was uninsured. Gurney pulled Snedeker over and requested proof of insurance, which Snedeker produced. Gurney then noticed an odor of alcohol on Snedeker's breath. He initiated a DUI investigation and found that Snedeker was indeed intoxicated. Snedeker was convicted of driving under the influence. He appealed on the ground that the initial stop was not supported by reasonable suspicion. The Utah Court of Appeals disagreed. It found that proof that a driver is not insured provides an officer with reasonable suspicion of illegal activity and authorizes him to pull over a vehicle. Snedeker also claimed the original stop was illegal since he did, contrary to the computer's information, have insurance. The court found that whether or not the information in the insurance database was correct is unimportant. The important issue is whether or not the officer's suspicions of illegal activity were reasonable. *Snedeker v. Rolfe*, No. 20070078 (Utah Ct. App. Dec. 20, 2007).

Tenth Circuit

A law providing that a person convicted of a drug felony who has two prior drug felony convictions is eligible for a mandatory life sentence does not violate the Eighth Amendment. 18 U.S.C. § 3553, requiring sentences be no greater than would fulfill the statute's objectives, does not apply in such a case.

Huskey was convicted of conspiracy to distribute and intent to distribute 50 grams or more of methamphetamine. He admitted to having 277 grams of meth and dealing 12 pounds of meth over a period of nine months. Huskey qualified for a sentencing enhancement under 21 U.S.C. § 841(b)(1)(A) which provides that a person convicted of a drug felony who has two or more prior convictions for a felony drug offense is subject to a mandatory life sentence. On appeal Huskey argued that he should not have been subject to the mandatory sentence because one of his prior convictions was not a drug felony. He also argued that the mandatory minimum sentence is in conflict with 18 U.S.C. §3553(a) which sets out sentencing objectives a judge needs to consider when determining a sentence and also provides that the court "shall impose a sentence not greater than necessary" to satisfy the sentencing objectives. He finally argued that a life sentence in this case is cruel and unusual punishment under the Eighth Amendment. The Tenth Circuit disagreed. One of Huskey's prior felony convictions was attempted possession of cocaine under Kansas § 21-3301(a). This statute covers attempts to commit any crime. Because the statute is so general,

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Huskey argues that his conviction was not under a law relating to narcotic drugs and, therefore, he is not subject to the sentencing enhancement. The court rejected this argument because there is no case law supporting this interpretation of the statute and the statute covers all types of criminal conduct, including drug offenses. As to Huskey's second argument on appeal, the court found that 18 U.S.C. § 3553 did not apply to mandatory sentences and, therefore, has no relevance in Huskey's case. Finally, the court concluded that mandatory life sentences for multiple drug felonies do not violate the Eighth Amendment because the amendment only forbids extreme sentences and this sentence is not disproportionate to the crimes committed. *United States of America v. Huskey*, No. 06-3183 (10th Cir. Sept. 18, 2007).

The use of dominance or control over a victim in a crime of nonconsensual sexual conduct may constitute a "forcible sexual offense" under U.S. Sentencing Guideline § 2L1.2(b)(1)(A)(ii) which enhances the sentence of a deported felon who illegally reenters the country.

Romero-Hernandez was convicted of illegal reentry following removal for commission of an aggravated felony. Under § 2L1.2(b)(1)(A)(ii) of the U.S. Sentencing Guidelines he received a sixteen-level upward adjustment to his sentence for reentering the country after being deported following a felony conviction for a crime of violence. On appeal Romero-Hernandez claimed that he was not eligible for the sentencing enhancement because his felony conviction was for "sexual abuse of a minor" which is not a crime of violence. The Tenth Circuit disagreed. The application notes of § 2L1.2 include "forcible sex offenses" as crimes of violence. The court cited the statute Romero-Hernandez was convicted under, Colo. Rev. Stat. § 18-3-404(1), to find whether "sexual abuse of a minor" is a forcible sex offense. The statute covers nonconsensual sexual contact and sexual contact when a victim is physically helpless. The court found that the types of nonconsensual contact covered in this statute did qualify as forcible sexual offenses. First, the court looked to the ordinary meaning of the legal language as defined in Black's Law Dictionary. The Dictionary states that unlawful contact with another person is forcible injury. Second, the court asserted that "force" does not necessarily need to be physical compulsion. The Dictionary states that force includes "[d]ominance, control, or influence." Black's Law Dictionary 1207 (8th ed. 2004). Third, the court cited the Sentencing Guidelines that state a crime of violence may include the *threatened* use of physical force. Therefore, the court found that Romero-Hernandez's crime of sexual abuse of a minor did constitute a crime of forcible sexual conduct because it entailed control and threatened physical force over the victim. Thus, the sentencing enhancement is appropriate under § 2L1.2(b)(1)(A)(ii). *United States v. Romero-Hernandez*, No. 05-2154 (10th Cir. Oct. 16, 2007).

In order to have standing to try a claim, a plaintiff must show (1) she has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) there is causation between the injury and the defendant's action; and (3) the injury will be redressed by a judgment in her favor.

G. Cook and J. Bronson tried to obtain a marriage license for a bigamous marriage. G. Cook was already married to D. Cook. Swenson, the Clerk for Salt Lake County, UT denied their request on the ground that it was an unlawful marriage. Cook brought an action against Swenson on the ground that Swenson's refusal violated their associational, free exercise, and substantive due process rights under the First and Fourteenth Amendments. The district court held that Plaintiffs had standing to challenge the constitutionality of Utah's anti-bigamy laws but granted summary judgment to Swenson. Cook appealed. The Tenth Circuit vacated the district court's judgment and remanded the case because it held that Cook had no standing to pursue his claims. The court said that to prove standing a plaintiff has to show (1) she has suffered an "injury in fact" that is "(a) concrete and particularized and (b) actual or imminent…";(2) there is causation between the injury and the defendant's action; and (3) the injury will be redressed by a decision in her favor. The court found that Cook did not have an injury in fact. Cook claimed that the injury was fear of criminal prosecution and the stigma of being a lawbreaker. Although the injury does not have to occur to have a triable claim, there needs to be a credible threat that the injury will occur. The court said that there was no actual prosecution and the potential of prosecution was not likely since Utah's Attorney General's Office focuses on crimes related to bigamy including abuse, fraud, and domestic violence rather than active prosecution of bigamy itself. The court also found that Cook

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failed to show causation. Under the third prong, the court found that it wasn't likely that the injury of fear of prosecution would be resolved by giving plaintiff relief against a clerk at the county office. *Cook v. Swenson*, No. 05-4161 (10th Cir. Aug. 29, 2007).

To admit evidence of former acts of sexual abuse under Rules 413 and 414, a court may evaluate the probative value of the evidence by analyzing the following factors: (1) the similarity of the prior acts and the charge act, (2) the time lapse, (3) the frequency of the prior acts, (4) intervening events, and (5) the need for evidence.

Benally was charged with one count of aggravated sexual abuse of N.W., his twelve-year-old granddaughter who had been left in his guardianship with her two sisters. The district court allowed the State to admit evidence of Benally's former charges of sexual abuse under Rules 413/414. Betty J., Benally's sister-in-law; Sarah J., the aunt of Benally's ex-wife; Virginia, Benally's sister; and Rowena, Benally's daughter, all testified that Benally had raped them when each girl was around twelve to fourteen years old. Each rape was proven before admitted into evidence. Benally was convicted and appealed on the ground that the evidence was unfairly prejudicial under Rule 403. Rule 413 and 414 provide an exception to Rule 404, which prohibits admission of evidence showing a defendant's propensity to commit a crime. Under 413 and 414 if a defendant is charged with sexual assault, evidence of the defendant's commission of other such offenses may be considered. In *United States v. Guardia*, 135 F.3d 1325 (10th Cir. 1998) the court named five factors to assist the court in weighing the probative value of evidence to be admitted under 413 and 414: (1) the similarity between the charged act and the prior act, (2) the time lapse between the two, (3) the frequency of the prior acts, (4) the occurrence of intervening events, and (5) the need for evidence beyond the testimony of the victim and the defendant. The district court found that the prior acts and the charged act are very similar: they were all committed against a close family member, the girls were all within the same age range, and on each occasion a weapon or force was used. The court acknowledged the large time lapse between the prior and charged acts, however, it did not find this

dispositive. The court found that there had been no intervening events. The court also found that the need for this evidence was great since there was not a lot of evidence besides the testimony of the victim. The district court also acknowledged the fact that there were limiting jury instructions that mitigated any probative dangers. The Tenth Circuit affirmed and admitted the evidence. *United States v. Benally*, No. 06-4173 (10th Cir. Aug. 29, 2007).

CRAWFORD CASES

Supreme Court of Ohio

when determining whether statements from a child declarant are testimonial or non-testimonial, courts should use the primary purpose test established in *Davis* which deems statements non-testimonial only if they were made in the course of an ongoing emergency.

Siler was charged with the first-degree murder of his wife, Barbara. Barbara and Siler were undergoing a divorce after Siler discovered that Barbara was having an affair. On September 20, 2001, Barbara's father discovered her dead body hanging from a rope in her garage. Police arrived and discovered Barbara and Siler's three-year-old son, Nathan, asleep in his bedroom. A child interviewer came to the scene and questioned Nathan. Nathan said that his father had been there the previous night, had been very angry, had fought with Barbara, and had tied something around her throat. Siler was convicted at trial court, but had his conviction reversed on the ground that the statements by Nathan were testimonial in nature and were, therefore, inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004) since Siler did not have a previous opportunity to cross-examine. The Supreme Court has established two tests to determine whether a statement is testimonial or non-testimonial. Under the objective-witness test, introduced in *Crawford*, a court asks

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whether the statements would lead an objective witness to believe that those statements would be used at trial, including statements made during a police interrogation. The second test is the primary purpose test given in *Davis v. Washington*, 126 S.Ct. 2266 (2006). Under this test statements are non-testimonial if the objective circumstances indicate that the primary purpose of the police interrogation is to aid in an ongoing emergency. On appeal, the State argued that the objective-witness test should be used and that the court should consider the test from the perspective of a three-year-old who would not be aware that his statements would be used at a later trial. The Ohio Supreme Court refused to use the objective-witness test. The court said that since *Davis* was decided, courts have used the primary purpose test rather than the objective-witness test in cases where the declarant is a child interrogated by police. Under the primary purpose test, the court found the statements to be inadmissible. The police interrogation was not in the midst of an ongoing emergency. Police arrived several hours after the crime had taken place. Nathan was calm and told the officers that things were fine. Also, the sole purpose of the interrogation was to gather evidence and not prevent harm or treat injury. Therefore, the reversal was upheld. *State v. Siler*, Slip Opinion No. 2007-Ohio-5637 (Oct. 25, 2007).

Supreme Court of Washington

Whether an interrogation is conducted during an ongoing emergency is determined by considering (1) the timing of the statement, (2) the threat of harm, (3) the need for information to resolve the emergency, and (4) the formality of the interrogation.

D.L. and L.F., two minors, were standing on a sidewalk waiting to be picked up when Ohlson drove by screaming racial slurs. Five minutes later, Ohlson returned and drove up onto the curb intending to hit the two minors. Ohlson did this five times, but D.L. and L.F. were able to avoid being hit. Officer Gray arrived five minutes later, having been called by a witness to the events. Gray asked the minors what had occurred and later used their statements about the incident in her testimony in court. Ohlson was convicted of two counts of assault but appealed on the ground that the statements were testimonial and were a violation of his rights under the Confrontation Clause because he was not able to cross-examine either minor. The Washington Supreme Court denied his claim and reiterated the holding of the appellate court that the statements were non-testimonial. The court remarked that determining whether a statement is testimonial may be done by assessing the purpose of the interrogation. If it is to enable a police officer to meet an ongoing emergency, it is non-testimonial. If it is to prove past events, it is testimonial. The court said to determine whether a statement is made during an emergency the court must consider "(1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve the present emergency, and (4) the formality of the interrogation." The court noted that this interrogation was only five minutes after the incident and the perpetrator was still at large and was still a danger to the minors. Also, the police officer needed the statements in order to assess the situation, find the perpetrator, and prevent any further injury. Finally, the interrogation lacked any formality. The officer said that the minors were "pretty upset" and "pretty shaken up." They were not in the calm and secure situation typically associated with formal police investigation. The court rejected the court of appeals' assertion that all excited utterances are non-testimonial. It also rejected the reasoning that whether a statement is testimonial can be determined by whether the language is used is in past or present tense. *State v. Ohlson*, No. 78238-5 (Wash. Oct. 18, 2007).

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The 2008 Training Calendar

Utah Prosecution Council (UPC) And Other Utah CLE Conferences

April 3-4	ANNUAL SPRING CONFERENCE *Case law update, legislative update, ethics and more*	Red Lion Hotel Salt Lake City, UT
May 13-15	ANNUAL DOMESTIC VIOLENCE CONFERENCE *Held this year in conjunction with the annual CJC conference*	Zermat Resort Midway, UT
August 7-8	UTAH MUNICIPAL PROSECUTORS SUMMER CONFERENCE *Really good stuff for all whose caseload includes primarily misdemeanors*	Zion Park Inn Springdale, UT
August 18-22	BASIC PROSECUTOR COURSE *Substantive and trial skills training for new prosecutors*	University Inn Logan, UT
September 10-12	FALL PROSECUTORS TRAINING CONFERENCE *The annual fall meeting for all Utah prosecutors*	Iron Cnty Conf Center Cedar City, UT
October 15-17	GOVERNMENT CIVIL PRACTICE CONFERENCE *Specifically for civil side attorneys from county and city offices*	Zion Park Inn Springdale, UT
November 2008	ADVANCED TRIAL SKILLS TRAINING	Specific date & Location TBA

National Advocacy Center (NAC)

NATIONAL ADVOCACY CENTER (NAC)

A description of and application form for NAC courses can be accessed by clicking on the course title or by contacting Utah Prosecution Council at (801) 366-0202; e-mail: mnash@utah.gov.

Courses at the NAC are free. Travel, lodging and meal expenses are paid or reimbursed by NAC, and no tuition is charged.

Funding for the National Advocacy Center has yet to be fully resolved. In the meantime, NDAA continues to offer courses at the NAC, albeit not with full reimbursement of expenses as in the past. Students who attend the NAC are asked to pay for most of their expenses. For specifics, contact the NAC directly.

See the table for course dates on the following page.	TRIAL ADVOCACY I *A practical, hands-on training course for prosecutors*	NAC Columbia, SC

NAC SCHEDULE *continued on page 15*

NAC SCHEDULE *continued from page 14*

Course Date	*Course Number*	*Registration Deadline*
Mar 5-9	*9-08-TA1*	*January 11th*
June 9-13	*10-08-TA1*	*February 8th*
July 21-25	*11-08-TA1*	*March 21st*
July 28 - August	*12-08-TA1*	*March 28th*
August 18-22	*13-08-TA1*	*April 18th*
September 8-12	*14-08-TA1*	*May 2nd*
September 29 - October 3	*15-08-TA1*	*Mar 23rd*

March 31 - April 4 — CYBERSLEUTH — NAC Columbia, SC
For prosecutors who handle, or foresee handling, computer-related cases
The registration deadline is January 30th

April 7-11, June 16-20, August 11-15 — BOOTCAMP: AN INTRODUCTION TO PROSECUTION — NAC Columbia, SC
A course for newly hired prosecutors
Reg. deadlines: Jan. 30th for the April course; Feb. 15th for the June course; April 11th for the Aug. course

May 19-22 — ARSON AND EXPLOSIVES — NAC Columbia, SC
The registration deadline is January 25th

May 13-16, August 25-28 — CROSS-EXAMINATION — NAC Columbia, SC
A complete review of cross-examination theory and practice
Registration deadlines: Jan. 18th for the May course; April 25th for the August course

June 2-6 — DNA – TRUE IDENTITY — NAC Columbia, SC
DNA "fingerprinting" on the witness stand
The registration deadline is February 1st

June 30 - July 2 — GANG RESPONSE — NAC Columbia, SC
A comprehensive response to gang crime for prosecutors and law enforcement
The registration deadline is February 29th

July 8-11 — COURTROOM TECHNOLOGY — NAC Columbia, SC
Upper Level PowerPoint®; Sanction II; Audio/Video Editing (Audacity, Windows Movie Maker); 2-D and 3-D Crime Scenes (SmardDraw, Sketchup®); Design Tactics
The registration deadline is March 7th

NAC SCHEDULE *continued on page 16*

NAC SCHEDULE *continued from page 15*

July 14-18	IMPAIRED DRIVER ***The registration deadline is March 14th***	NAC Columbia, SC
September 22 - 26	TRIAL ADVOCACY II *Practical instruction for experienced trial prosecutors* ***The registration deadline is May 16th***	NAC Columbia, SC
August 4-8	UNSAFE HAVENS II *Prosecuting on-line crimes against children* ***The registration deadline is March 21st***	NAC Columbia, SC

National College of District Attorneys (NCDA) and American Prosecutors Research Institute (APRI)

February 17-21	EVIDENCE FOR PROSECUTORS - NCDA*	Las Vegas, NV
March 2-6	PROSECUTING HOMICIDE CASES - NCDA*	Orlando, FL
March 2-6	SOLVING PROSECUTION PROBLEMS - NCDA*	Mesa, AZ
March 30 - April 3	PROSECUTING DRUG CASES - NCDA	Myrtle Beach, SC
April 6-10	CONTEMPORARY TRIAL ISSUES - NCDA*	Lake Tahoe, NV
April 21-25	MEETING CHALLENGES IN PROSECUTION & VICTIM ADVOCACY*	Chicago, IL
May 4-8	SPECIAL PROSECUTIONS COURSE - NCDA*	San Diego, CA
May 18-22	OFFICE ADMINISTRATION COURSE - NCDA*	Marco Island, FL
June 1-11	CAREER PROSECUTOR COURSE - NCDA* *The one course that should be attended by everyone who make prosecution their career*	Charleston, SC
June 22-26	CRIME SCENE INVESTIGATIONS - NCDA*	Las Vegas, NV

***** For a course description and on-line registration for this course, click on the course title or call Prosecution Council at (801) 366-0202, e-mail: mnash@utah.gov.